

STATE OF MICHIGAN
COURT OF APPEALS

LARRY STERLING and THE STERLING
ASSOCIATION, INC.,

UNPUBLISHED
December 20, 2007

Plaintiffs/Counter-Defendants-
Appellants,

v

No. 268176
Wayne Circuit Court
LC No. 03-334848-CZ

BURNSIDE INDUSTRIES, L.L.C.,

Defendant/Counter-Plaintiff-
Appellee,

and

BRIAN BURNSIDE, d/b/a L & K SALES,

Defendant/Counter-Plaintiff.

Before: White, P.J., and Zahra and Fort Hood, JJ.

ZAHRA, J., (*dissenting in part and concurring in part*).

I concur in footnote five of the majority opinion, which permits plaintiffs to tax costs for the additional transcripts that defendant was required to file for the cross appeal that defendant failed to pursue. In all other respects, I respectfully dissent. Contrary to the opinion of the majority, I conclude the contract at issue in the present case is susceptible to but one interpretation—that post-termination commissions are payable only if defendant terminated the agreement for good cause under section 12. I would affirm the judgment of the trial court.

Plaintiff Larry Sterling worked as an independent manufacturers sales representative for defendant Burnside Industries, L.L.C.,¹ pursuant to a written contract executed in October 2000. The duration of the agreement was governed by section 6, which provided:

¹ For purposes of this opinion, the singular “plaintiff” is used to refer to plaintiff Larry Sterling, and the singular “defendant” is used to refer to defendant Burnside Industries, L.L.C.

6. TERM

The term of this Agreement shall be Three Years (3) years [sic] commencing on October 23, 2000 through October, 2003, however, said contract shall automatically renew from year to year unless canceled in writing by either party hereto at least sixty days prior to expiration of any yearly term hereunder.

Additionally, section 12 provided that defendant had the right to terminate the agreement for good cause, upon 90 days' notice:

12. TERMINATION

BURNSIDE reserves the right to terminate this Agreement for good cause by providing Agent with 90 days written notice of termination.

Agent shall be entitled upon termination to full commissions on all purchase orders accepted by **BURNSIDE** prior to the actual termination date as provided for above.

After termination date Agent shall continue to be entitled to full commissions on sales of all products pursuant to purchase orders accepted by **BURNSIDE** prior to the termination date even though such products may be delivered after said date and even though said purchase order may automatically renew under a new purchase order number. This right to commissions shall be for the period of one year (1) year [sic] at 100% commission and at the rate of 50% for the second.

On or about May 12, 2003, plaintiff informed defendant in writing of his intention to terminate the sales agreement. Shortly thereafter, defendant acknowledged in writing that the agreement would be cancelled, effective October 2003, in accordance with section 6. Plaintiffs thereafter filed this action alleging entitlement to both pre-termination and post-termination sales commissions under the agreement. The trial court determined that plaintiff was entitled to post-termination commissions only if defendant terminated the agreement under section 12. The trial court granted defendant's motion for summary disposition with respect to post-termination commissions because it concluded that defendant did not terminate the agreement for good cause under section 12. Rather, the trial court concluded the agreement was cancelled in accordance with section 6, which does not permit post-termination commissions. The majority concludes that the trial court erroneously concluded the parties' contract clearly and unambiguously precluded post-termination commissions under the facts and circumstances presented in this case.

A court's obligation when interpreting a contract is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The agreement must be read as a whole. *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005).

If the language of the contract is unambiguous, we construe and enforce the contract as written. . . . Thus, an unambiguous contractual provision is

reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Products, supra* at 375 (Citations omitted).]

If apparent to the reader, contractual language is construed according to its plain and ordinary meaning, while technical or constrained constructions are to be avoided. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996). Courts do not have the right to make a different contract for the parties or look to extrinsic evidence to determine the parties' intent when the words of the contract are clear and unambiguous and have a definite meaning. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); see also *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947), and *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941).

If a contract's language is clear, construction of the contract is a question of law for the trial court. *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997).

Hence, in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous. *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate. *SSC Associates, supra*, p 363. [*D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).]

Although plaintiff initially attempted to terminate the parties' agreement under section 12, that section vests plaintiff with no right to terminate the agreement. Section 12 only permits defendant to terminate the agreement, and only upon a showing of good cause. Plaintiff does not contend that the agreement was terminated for good cause. Further, plaintiff confirmed in writing that he was electing not to renew the agreement when the current contract term ended in October 2003. Thus, the undisputed evidence shows that the agreement was cancelled in accordance with section 6; it was not terminated under section 12.

Nonetheless, the majority opinion concludes that the contract does not make clear the distinction between termination and cancellation in the context of commissions. Thus, the majority opinion concludes the parties may have intended the portion of section 12, which allows for the recovery of post-termination commissions in the event of termination, to also apply to cancellation of the agreement under section 6. Even accepting that the terms "cancellation" and "termination" have similar meanings, the majority opinion fails to take into account that the parties to this contract chose to use separate terms to distinguish when commissions are due after the agreement ended, and to define the circumstances under which the agreement could be canceled or terminated.

The word "canceled" is found only in section 6 of the agreement; it is nowhere to be found in section 12. Similarly, the words "terminate" and "termination" are nowhere to be found

in section 6 and are used only in section 12. We must presume that parties intentionally chose the words that define their agreement. It is significant that the parties did not provide for post-cancellation commissions in section 6. It is also significant that the parties expressly provided that in the event the agreement was terminated for good cause, as provided in section 12, post-termination commissions are payable. There is nothing in the language of the agreement to support the conclusion that the right to post-termination commissions under section 12 applies to a cancellation of the agreement under section 6. Rather, in my opinion, when reading this contract as a whole it is apparent that section 12 was intended to only allow for post-termination commissions in the event defendant elected to terminate the agreement for good cause before October 2003, or before a subsequent annual term ended.

For these reasons, I conclude the trial court did not err in granting defendant's motion for summary disposition. I would affirm.

/s/ Brian K. Zahra